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PROCEEDINGS AND ORDERS

DATE: 050385

CASE NBR 84-1-00600 CFX
SHORT TITLE Cooper, Karen A.
VERSUS U.S. Postal Service

DOCKETED: Oct 10 1984

Date	Proceedings and Orders
Oct 10 1984	Petition for writ of certiorari filed.
Oct 29 1984	Order extending time to file response to petition until December 13, 1984.
Dec 13 1984	Further extension of time to file a response to the petition, and order denying same by Rehnquist, J., 12/18/84.
Dec 19 1984	DISTRIBUTED. January 11, 1985
Jan 3 1985	Brief of respondent U.S. Postal Service in opposition filed.
Jan 9 1985	Reply brief of petitioner Karen A. Cooper filed.
Feb 1 1985	REDISTRIBUTED. February 15, 1985
Mar 25 1985	REDISTRIBUTED. March 29, 1985
Apr 5 1985	REDISTRIBUTED. April 12, 1985
Apr 15 1985	Petition DENIED. Dissenting opinion by Justice White. (Detached opinion.)

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84-600

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

KAREN A. COOPER,
Petitioner,

VS.

UNITED STATES POSTAL SERVICE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

THE EMPLOYMENT LAW CENTER
JOAN N. GRAFF
LINDA J. KRIEGER
Counsel of Record
PATRICIA A. SHIU
SUZANNE I. PRICE
Law Clerk
693 Mission Street, 7th Floor
San Francisco, CA 94105
(415) 495-6420
ELLEN LAKE
JEFFREY E. ESTES & ASSOCIATES
MARK F. CAROLIN

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

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QUESTIONS PRESENTED

1. Whether the requirement of 42 U.S.C. section 2000e-16(c) that a Title VII complaint against the federal government be filed with the court within thirty days of receipt of notice of final administrative disposition of a discrimination complaint is a jurisdictional prerequisite to suit in federal court, or, like a statute of limitations, is subject to waiver, estoppel or equitable tolling.

2. Whether, in jurisdictions where timely service of process can be effected after a statute of limitations has run, the requirement of F.R.C.P. Rule 15(c) that a new defendant have received notice "within the period provided by law for commencing an action against him" should be interpreted to include a reasonable time for service of process.

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KAREN A. COOPER,
Petitioner,

vs.

UNITED STATES POSTAL SERVICE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Karen A. Cooper petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, No. 83-6106, slip op. at 3025 (9th Cir. Jul. 12, 1984), (App., infra, A-1—A-8) is reported at ..... F.2d ..... The opinion of the district court (App., infra, A-9—A-11) is reported at 578 F.Supp. 846 (S.D. Cal. 1983).

JURISDICTION

The judgment of the court of appeals (App., infra, A-12) was entered on July 12, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1).

STATUTES INVOLVED

Section 717(a) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. 2000e-16(a), provides in relevant part:

> All personnel actions affecting employees or applicants for employment . . . in the United States Postal Service . . . shall be made free from any discrimination based on race, color, religion, sex or national origin.

Section 717(c) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. 2000e-16(c), provides in relevant part:

> Within thirty days of receipt of notice of a final action taken by a department, agency, or unit referred to in subsection (a) of this section . . . an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

Rule 15(a) of the Federal Rules of Civil Procedure, provides in relevant part:

> *Amendments.* A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

Rule 15(c) of the Federal Rules of Civil Procedure provides:

> *Relation Back of Amendments.* Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.
>
> The delivery or mailing of process to the United States Attorney, or his designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

Federal Rules of Civil Procedure, Rule 3 provides:

> *Commencement of Action.* A civil action is commenced by filing a complaint with the court.

Federal Rules of Civil Procedure, Rule 4(a) provides in pertinent part:

> (a) *Summons: Issuance.* Upon the filing of the complaint, the clerk shall forthwith issue a summons and deliver the summons to the plaintiff or the plaintiff's attorney, who shall be responsible for prompt service of the summons and a copy of the complaint.

STATEMENT

This case involves the statutory construction of section 717(c) of the Civil Rights Act of 1964, 42 U.S.C. section 2000e-16(c), and the interpretation to be given Rule 15(c) of the Federal Rules of Civil Procedure in Title VII cases against the United States in which the plaintiff initially sues an improper defendant and later seeks to amend her complaint to substitute the proper defendant. The case presents two related procedural issues. First, does section 717(c) of Title VII require that a plaintiff who alleges that she has been subjected to employment discrimination by the federal government file an action naming the proper defendant within thirty days after receiving notice of right to sue, or have her action dismissed for lack of federal subject matter jurisdiction? Second, under Rule 15(c) of the Federal Rules of Civil Procedure, can a plaintiff, who within the thirty-day period filed an action under section 717 naming the wrong defendant, later amend her complaint to name the proper party defendant, so long as the new defendant has received notice of the action within a reasonable time after its commencement?

FACTS

Petitioner, Karen A. Cooper, worked as a distribution clerk for the United States Postal Service in its San Diego main branch for approximately nine years. Thereafter, Ms. Cooper applied for a part-time letter carrier position and was denied that position, allegedly because of her sex.

Ms. Cooper filed a timely employment discrimination charge against the United States Postal Service in which she set out the acts giving rise to this action. On September

30, 1982, Ms. Cooper received the final agency decision, dated September 24, 1982, from the United States Postal Service on her discrimination charge. The decision closed Ms. Cooper's case with a finding of no discrimination and stated that Ms. Cooper could institute a civil action in the appropriate United States District Court within thirty days of the letter's receipt.

On October 29, 1982, Ms. Cooper filed a complaint in federal district court alleging, *inter alia,* a violation of section 717 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. section 2000e-16, which prohibits discrimination in federal employment.[1] The complaint named the United States Postal Service as the defendant. In her complaint, plaintiff properly invoked the jurisdiction of the district court pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. sections 2000e-16(c) and 2000e-5(f)(3). The complaint was served on the United States Attorney and the Attorney General in January 1983, and on the Postmaster General, William F. Bolger, in February 1983.

Respondent Postal Service moved to dismiss petitioner's complaint under Federal Rules of Civil Procedure, Rule 12(b)(2) for lack of subject matter and personal jurisdiction, and under Rule 12(b)(6) for failure to state a claim

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[1]In her complaint plaintiff also alleged a violation of her civil rights under 42 U.S.C. sections 1983 and 1985. Plaintiff's First Amended Complaint additionally alleged a violation of 42 U.S.C. section 1986. Consideration of these other claims is not necessary to the resolution of the questions presented to the Court. After filing her initial action in federal court, Ms. Cooper added an additional claim for retaliation under section 704 of Title VII, 42 U.S.C. section 20000e-3.

upon which relief could be granted.[2] Respondent asserted in its motion to dismiss that, pursuant to 42 U.S.C. section 2000e-16(c), the head of the Postal Service, Postmaser General William F. Bolger was the only proper party defendant in an action under section 717. Respondent further asserted that petitioner's failure to name Bolger in her initial complaint filed within the thirty-day period deprived the court of subject matter jurisdiction and rendered that complaint subject to dismissal for failure to state a claim upon which relief could be granted.

Petitioner Cooper filed a cross motion under Rule 15 of the Federal Rules of Civil Procedure to amend her complaint to name William F. Bolger as the defendant. In her motion plaintiff argued that, under Rule 15(a), leave to amend should be freely granted when justice so requires, and that in light of this provision and the absence of prejudice to the defendant, she should be given an opportunity to amend her complaint to state the proper defendant.

The district court denied petitioner's motion to amend her complaint and granted respondent's motion to dismiss the action with prejudice. The court held that under Title VII, the proper party defendant in a 717 action is the "head of the department, agency or unit, as appropriate," and that since petitioner had named only the United States Postal Service and Does 1 through 50, her complaint had to

[2]In addition, the Government moved to strike those allegations in plaintiff's complaint referring to 28 U.S.C. sections 1343(3) and 1343(4) (jurisdiction over cases alleging deprivation of civil rights under color of state law), 42 U.S.C. sections 1983 and 1985, and plaintiff's prayer for injunctive relief, compensatory and punitive damages, and plaintiff's request for a jury trial.

be dismissed (App. B, *infra*, A-10—A-11). The district court denied petitioner's motion to amend on the ground that the United States Government did not receive actual notice of the commencement of the action within the thirty-day filing period set out in section 717, as allegedly required by Rule 15(c).

The United States Court of Appeals for the Ninth Circuit affirmed. First, the Ninth Circuit held that the thirty-day time limit for filing an action under 717 is jurisdictional in nature and is not, like a statute of limitations, subject to waiver, estoppel, or equitable tolling (App., *infra*, A-1—A-8). Second, while acknowledging the lack of unanimity among the circuits concerning the proper interpretation of Rule 15(c)'s notice requirement, the Ninth Circuit stated that it adhered to a literal interpretation of that rule. In conformity with this interpretation, the court held that Cooper's failure to notify the proper defendant until after the thirty-day period had passed precluded application of Rule 15(c) to save Cooper's claims (App., *infra*, A-7).

REASONS FOR GRANTING PETITION

Certiorari should be granted in this case for three reasons. First, there exists a sharp conflict between the circuits with respect to both of the questions presented. Second, the Ninth Circuit's holding that the time period for the commencement of an action under section 717 is jurisdictional conflicts with this Court's recent decision in *Baldwin County Welcome Center v. Brown*, ... U.S. ....., 104 S. Ct. 1723 (1984). Third, the Ninth Circuit's decision regarding the proper interpretation of Rule 15(c)'s notice requirement involves an important question of federal law which has not yet been decided by this court and conflicts with the

purpose of Rule 15(c) as presented by the Advisory Committee in its Note on the 1966 Amendment to that Rule.

1. Conflict Between the Circuits

a. The Jurisdictional Issue

The decision below that the thirty-day filing period in section 717 is jurisdictional conflicts with the decision of the Tenth Circuit in *Martinez v. Orr*, 738 F.2d 1107 (10th Cir. 1984), as well as with prior decisions of the Fifth, Eleventh and District of Columbia Circuits. *Sessions v. Rusk State Hospital*, 648 F.2d 1066 (5th Cir. 1981) (holding that ninety-day time period in private employer actions under section 706(f) is not jurisdictional); *Milam v. United States Postal Service*, 674 F.2d 860 (11th Cir. 1982); *Saltz v. Lehman*, 672 F.2d 207 (D.C. Cir. 1982). On the other hand, the Ninth Circuit's position is consistent with that taken by the Seventh Circuit in *Sims v. Heckler*, 725 F.2d 1143 (7th Cir. 1984) and the Sixth Circuit in *Rea v. Middendorf*, 587 F.2d 4 (6th Cir. 1978).

The view of the Fifth, Tenth, Eleventh and District of Columbia Circuits is best exemplified by the Tenth Circuit's decision in *Martinez*, 738 F.2d 1107, which held that the thirty-day time limit of section 2000e-16(c) is not jurisdictional, but is, like a statute of limitations, subject to waiver, estoppel and equitable tolling. In reaching this conclusion, the Tenth Circuit relied on the decision of the United States Supreme Court in *Zipes v. Trans World Airlines*, 455 U.S. 385 (1982), which held that the filing of a timely charge of discrimination with the Equal Employment Opportunity Commission is not jurisdictional but is subject to equitable tolling. 455 U.S. at 393. Neither the Sixth, Seventh, or Ninth Circuit decisions takes *Zipes* into account.

The result of these divergent interpretations of section 717's thirty-day requirement has been and continues to be a gross inequality of enforcement of Title VII in actions against the federal government. When a plaintiff brings an action initially naming an improper defendant in a circuit that interprets the thirty-day limit as jurisdictional, she will, on the basis of a procedural technicality, lose her opportunity to vindicate her civil rights. On the other hand, her counterpart, who files a complaint containing the same minor error in a circuit that permits equitable tolling, will be allowed to proceed to a determination on the merits of her claim. It is incumbent on this Court to provide a uniform interpretation of section 717(c) which will ensure that federal employees have access to the courts to vindicate their civil rights on an equal basis throughout the country.

This sharp conflict in the circuits has produced a significant disparity in the disposition of Title VII actions, depending solely on whether the Title VII plaintiff has brought her action within a circuit which views the thirty-day period as jurisdictional, or whether the action was brought in a circuit where equitable tolling is recognized. The question presented here determines the continued viability or summary disposal on procedural technicalities of Title VII discrimination cases against the federal government. The question is of crucial importance to the hundreds of plaintiffs who now have Title VII cases against the federal government pending in the judicial system and to potential government employees who may in the future bring actions under this law. This Court should

resolve the disagreement over the interpretation of this important federal statute.

b. The 15(c) Issue

With respect to the second question presented, the Ninth Circuit's holding in this case that Rule 15(c) requires actual notice to a new defendant within the statutory time period conflicts with the interpretation given that rule by the Second Circuit in *Ingram v. Kumar,* 585 F.2d 566 (2nd Cir. 1978), *cert. denied,* 440 U.S. 940 (1979), by the Fifth Circuit in *Kirk v. Cronvich,* 629 F.2d 404 (5th Cir. 1980), and by the Sixth Circuit in *Ringrose v. Engelberg Huller Co.,* 692 F.2d 403 (6th Cir. 1982).

The position of the Second, Fifth and Sixth Circuits is best explicated by the Second Circuit's decision in *Ingram v. Kumar,* 585 F.2d 566. In its opinion, the court implies that in states where service of process must be effected within the statute of limitations period, Rule 15(c)'s requirement that actual notice be received "within the period provided by law for the commencement of the action" is properly construed as requiring notice on a substituted defendant within the statutory limitations period. However, notes the court, in many states and under the federal rules, timely service can be made on a defendant after the statute of limitations has run; it is only the filing of a complaint which must be completed before the statute runs. In these states, and in federal courts hearing federal question cases, "the period provided by law for commencing the action" includes a reasonable time following the expiration of the statute of limitations for service of

process.[3] Consequently, the Second Circuit view holds that in jurisdictions permitting post-statute of limitations service of process under Rule 15(c) the period within which "the party to be brought in" must receive notice of the action includes a reasonable time as allowed for service of process. 585 F.2d at 571-572.

The Ninth Circuit view adopted in the court below, which is also the view adhered to by the Seventh Circuit in *Hughes v. United States,* 701 F.2d 56 (7th Cir. 1982) and *Stewart v. United States,* 655 F.2d 741 (7th Cir. 1981), interprets the phrase "the period provided by law for the commencement of the action" to mean only the statute of limitations period. It does not interpret that period to include a reasonable time for the service of process, even in those jurisdictions which permit an initial defendant to be served after the statutory period has passed.

This conflict between the circuits results in unequal treatment not only of civil rights plaintiffs, but of litigants in all types of cases in federal court who initially sue the "wrong" defendant. This problem has arisen in hundreds of different factual contexts, and it will undoubtedly continue to do so. *See* C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE 1498 (Supp.); Note: *Federal Rule of Civil Procedure 15(c): Relation Back of Amendments,* 57 Minn. L. Rev. 83 (1972). It is plainly inequitable and

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[3]See Federal Rules of Civil Procedure, Rules 3 and 4(a). Presumably, in a diversity case, whether the "period provided by law for the commencement of the action" would include reasonable post-statute time for service of process would depend on whether, in the state where the court sat, the statute was tolled by filing of a complaint or by service of process. *See, Ragan v. Merchants Transfer and Warehouse Co.,* 337 U.S. 530 (1949).

injurious to the effective administration of justice for the substitution of an initially misnamed defendant to relate back to the filing of the initial complaint in one circuit, thus saving a plaintiff's claims, when the exact same facts would lead to dismissal of a plaintiff's case in another circuit. In addition to this unjust difference in treatment, the conflict between the circuits is creating substantial confusion and uncertainty in the district courts in circuits which have yet to rule on this issue. For both of these reasons, this Court should review the Ninth Circuit decision and resolve the disagreement over the proper interpretation of Rule 15(c).

2. Conflict With Applicable Supreme Court Precedent

Review should also be granted because the decision below regarding the "jurisdictional" nature of section 717 failed to consider and conflicts with the recent United States Supreme Court decision in *Baldwin County Welcome Center v. Brown,* ..... U.S. ....., 104 S. Ct. 1723 (1984).

The Ninth Circuit *Cooper* decision is predicated on the assumption that the thirty-day filing requirement of Section 717(c) is jurisdictional (App., *infra,* A-1—A-8). The *Baldwin County Welcome Center* case, decided April 16, 1984, sharply undercuts that assumption, thus raising serious questions about the basic theoretical underpinning of *Cooper.*

In *Baldwin County Welcome Center,* ..... U.S. ....., 104 S. Ct. 1723, the United States Supreme Court reviewed a decision of the Eleventh Circuit which had excused a Title VII plaintiff's failure to comply with the ninety-day filing period contained in section 706(f)(1) of the Act, 42 U.S.C. section 2000e-5(f)(1), which section applies to suits against

private employers. The *Baldwin County* Court did not hold that the section 706(f)(1) time limit was jurisdictional. Rather, it applied its prior conclusion in *Zipes v. Trans World Airlines,* 455 U.S. 385 and reviewed the Eleventh Circuit's decision for facts which would justify the application of equitable tolling. ..... U.S. ....., 104 S. Ct. at 1725. Finding no facts in the record which would call for application of that doctrine, the Court reversed the decision of the Eleventh Circuit. ..... U.S. ....., 104 S. Ct. at 1726.

The Supreme Court's decision in *Baldwin County* is thus premised on the proposition that the ninety-day filing limit for private employee actions is not jurisdictional, but is, like a statute of limitations, subject to waiver, estoppel and equitable tolling. *See, Baldwin County Welcome Center v. Brown,* ..... U.S. ....., 104 S. Ct. 1723, 1731 (Stevens, J., dissenting). Given that the Supreme Court views the section 706(f)(1) time limit for private employee actions as being subject to equitable tolling, the Ninth Circuit in *Cooper* erred in holding that the filing limit for federal employee actions under section 717 is jurisdictional. The legislative history supporting the addition of section 717 to Title VII in 1972 makes clear that substantive procedural rules governing section 717 actions by federal employees should be congruent with rules applicable to private employee actions. *See,* H.R. REP. No. 1746, 92d Cong., 2d Sess. 103, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 2157-60. *See also, Martinez v. Orr,* 738 F.2d at 1110. The conflict between the decision rendered below and the *Baldwin County Welcome Center* decision requires that this Court promptly review the decision below to ensure uniformity with the Court's prior decisions.

3. Important Issue Not Yet Addressed By This Court

Review is also required because the interpretation of Rule 15(c)'s notice requirement in the context of a plaintiff's attempt to substitute a proper for an improper defendant has not yet been addressed by this Court, and because the Ninth and Seventh Circuit's interpretation of 15(c) is incorrect.

The primary purpose of the 1966 Amendment to Rule 15(c) was to rectify the unjust results being reached prior to that time in cases brought under the Social Security Act, in which cases plaintiffs frequently named the United States, or the Department of Health, Education and Welfare as defendants in actions seeking review of denials of Social Security benefits. *See Advisory Committee Note of 1966 to Rule 15(c).* Under the Social Security Act, an action to review an agency's decision must be brought within sixty days after that decision and must name as the defendant the Secretary of Health, Education and Welfare. In numerous cases, directly analogous to the case now before the Court, Social Security claimants instituted timely actions, but mistakenly named as defendant a party other than the Secretary of Health, Education and Welfare. Discovering their mistakes, the claimants moved to amend their complaints to name the proper defendant. But, because the sixty day period had expired, their motions were denied and their cases dismissed. *See, Advisory Committee Note of 1966 to Rule 15(c):* Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I),* 81 Harvard L. Rev. 356 (1967); Byse, *Suing the 'Wrong' Defendant in Judicial Review of Federal Administrative Action: Proposals for*

Reform, 77 Harvard L. Rev. 39 (1963). Rule 15(c) was adopted to ensure that these claims could be decided on their merits, rather than being subjected to dismissal on technical procedural grounds at odds with Rule 15(a)'s injuncton that leave to amend be freely granted when the interests of justice so require.

With respect to suits against the federal government, the new rule provided that the delivery or mailing of process to the United States Attorney or to the Attorney General, in accordance with F.R.C.P. Rule 4, would satisfy Rule 15(c)'s notice requirement. *Advisory Committee Note of 1966 to Rule 15(c).*

However, both Rule 15(c) and the Advisory Committee Note left unclear whether "the period provided by law for commencing the action", within which time the new defendant must receive notice of the suit, includes a reasonable time after the filing of the complaint for service of process, as is permitted under F.R.C.P. Rules 3 and 4(a). *See Ingram v. Kumar,* 585 F.2d 566, 571 (2d Cir. 1978); *Kirk v. Cronvich,* 629 F.2d 404, 408 (5th Cir. 1980).

It is this ambiguity which has led to conflicting interpretations within the circuits. The restrictive interpretation applied by the Seventh and Ninth Circuits, which interpretation does not permit post-statute service, not only defeats the purpose of the 1966 Amendment, but also leads to the anomalous result that, in a jurisdiction that permits post-statute service of process, a misnamed defendant is entitled to *earlier* notice than he would have received had the complaint originally named him correctly. *Ingram v. Kumar,* 585 F.2d at 571. This anomaly demonstrates that the Ninth Circuit view fails to serve any of the policies

underlying statutes of limitations, which policies are the only legitimate reasons for denying a motion to amend a complaint. *See Advisory Committee Note of 1966 to Rule 15(c):* Kaplan, *supra,* at 408. The view of the Second, Fifth and Six Circuits is congruent with the philosophy underlying Rule 15 that leave to amend should be freely given when justice so requires, and also preserves the policies underlying statutes of limitations by requiring that the new defendant have received notice within a reasonable time after the commencement of the action.

This Court should review the decision below to clarify this important issue of law and to assure that the policies and purposes motivating the 1966 Amendment of Rule 15 are not undermined by an overly restrictive interpretation of that Rule.

CONCLUSION

For all the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

THE EMPLOYMENT LAW CENTER
JOAN N. GRAFF
LINDA J. KRIEGER
Counsel of Record
PATRICIA A. SHIU
SUZANNE I. PRICE
Law Clerk
693 Mission Street, 7th Floor
San Francisco, CA 94105
(415) 495-6420

ELLEN LAKE
JEFFREY E. ESTES & ASSOCIATES
MARK F. CAROLIN

(Appendices follow)

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-6106
DC No. CV 82-1475-T-M

Filed: Jul. 12, 1984

KAREN A. COOPER, PLAINTIFF-APPELLANT

v.

U.S. POSTAL SERVICE, DEFENDANT-APPELLEE

OPINION

Appeal from the United States District Court
for the Southern District of California
Howard B. Turrentine, District Judge, Presiding

Argued and Submitted April 4, 1984

Before: WALLACE, SCHROEDER, and NELSON, Circuit Judges

WALLACE, Circuit Judge:

Cooper appeals from the dismissal with prejudice of her Title VII complaint. The district court also denied Cooper's motion to amend her complaint and name the proper defendant. The dismissal was based upon a lack of jurisdiction because Cooper failed to file an action naming the proper defendant within the period provided by 42 U.S.C. § 2000e-16(c). We have jurisdiction under 28 U.S.C. § 1291, and affirm.

I

Cooper is a female employee of the United States Postal Service (USPS). On December 1, 1980, she filed a complaint with USPS's Department of Equal Opportunity, alleging that she had not been selected for a part-time regular carrier position because of gender-based discrimination. On September 30, 1982, Cooper received notice that her claim had been denied and that under 42 U.S.C. § 2000e-16(c) she had thirty days in which to file an action in federal court for violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2000e-17. On October 29, 1982, one day before the statutory limitations period expired, Cooper filed a complaint naming USPS as the only defendant. She served copies of the complaint on the United States Attorney and the Attorney General in January of 1983, and on the Postmaster General one month later. The record does not indicate when USPS was served. Cooper concedes that she served none of these parties within the thirty-day period that expired on October 30, 1982.

The government subsequently moved to dismiss Cooper's complaint on the ground that she had not named the Postmaster General, who was the proper defendant under 42 U.S.C. § 2000e-16(c). Cooper responded by moving to amend her complaint and substitute the Postmaster General as a defendant under rule 15(c) of the Federal Rules of Civil Procedure. The court denied Cooper's rule 15(c) motion because the Postmaster General had not received notice of Cooper's action within the statutory thirty-day period. The district court also concluded that it lacked jurisdiction because of Cooper's failure to name the proper defendant and dismissed her complaint with prejudice. As the district judge clearly intended his order to be a final disposition

of the case, we treat his order as dismissing the action. *Ruby v. Secretary of United States Navy,* 365 F.2d 385, 387 (9th Cir. 1966).

II

On appeal, we must determine whether the district court abused its discretion by denying Cooper's motion to substitute the Postmaster General for USPS in her Title VII action. *See Korn v. Royal Caribbean Cruise Line, Inc.,* 724 F.2d 1397, 1399 (9th Cir. 1984) (*Korn*). Our analysis depends on the interplay of 42 U.S.C. § 2000e-16(c) and rule 15(c) of the Federal Rules of Civil Procedure. The former, which governs civil actions against the federal government for Title VII violations, states in part:

> Within thirty days of receipt of notice of final action taken by a department, agency, or unit . . . on a complaint of discrimination based on . . . sex . . ., an employee or applicant for employment, if aggrieved by the final disposition of his complaint, . . . may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

This section has twofold relevance to Cooper's case. First, its clearly states that "the head of the department, agency, or unit . . . shall be the defendant" in Title VII actions against the federal government. *See, e.g., White v. General Services Administration,* 652 F.2d 913, 916 n.4 (9th Cir. 1981). Thus, the Postmaster General was the only proper defendant for Cooper's action. Second, it gives federal employees only thirty days after receiving notice of final agency action on their claim in which to file suit. *See, e.g., Rice v. Hamilton Air Force Base Commissary,* 720 F.2d

1082, 1083 (9th Cir. 1983) (thirty day limit is jurisdictional).

In view of Cooper's conceded failure to file a complaint against the Postmaster General within the statutory period, her claim must be barred unless her attempt to substitute the Postmaster General as a defendant relates back to the date her original complaint was filed. Rule 15(c), which governs the relation back of amendments to pleadings, states:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

Strictly interpreting the rule, the district court determined that the Postmaster General could not be substituted as the defendant under rule 15(c) because he did not "receive such notice of the institution of the action" "within the period provided by law for commencing the action against him." The facts are essentially undisputed. The only issue before us, therefore, is whether the strictures of rule 15(c) should be interpreted other than as literally read.

There is no unanimity among the circuits concerning the proper interpretation of rule 15(c)'s notice provision. The Second, Fifth, and Sixth Circuits have determined that the rule cannot be read literally to require notice to the substitute party within the statutory limitations period. *See Ringrose v. Engelberg Huller Co.*, 692 F.2d 403, 410 (6th Cir. 1982) (Jones, J., concurring) (allowing reasonable period for service of process following expiration of statutory period); *accord Kirk v. Cronvich*, 629 F.2d 404, 408 (5th Cir. 1980); *Ingram v. Kumar*, 585 F.2d 566, 571-72 (2d Cir. 1978), *cert. denied*, 440 U.S. 940 (1979).

Other circuits have literally applied rule 15(c)'s strict notice requirement. *Stewart v. United States*, 655 F.2 741, 742 (7th Cir. 1981) ("Having elected to file suit on the last day of the limitations period, plaintiff requests us to add to that period a 'reasonable time' for service of process. We cannot expand the . . . period established by Congress."); *accord Hughes v. United States*, 701 F.2d 56, 58-59 (7th Cir. 1982). *See also Archuleta v. Duffy's Inc.*, 471 F.2d 33, 34-36 (10th Cir. 1973).

This circuit adheres to a literal interpretation of rule 15(c)'s notice requirement. For example, in *Williams v. United States*, 711 F.2d 893 (9th Cir. 1983) (*Williams*), we recently applied a literal interpretation of rule 15(c) in a case quite similar to Cooper's. The plaintiff filed her action against the Federal Aviation Administration (FAA) seven days before the statutory limitations period expired. The district court subsequently granted the FAA's motion to dismiss because the United States was the only proper defendant for the plaintiff's action under the Suits in Admiralty Act. We upheld the district court's denial of

the plaintiff's rule 15(c) motion to name the United States as a defendant because the United States did not receive notice of the action until one day after the statutory limitations period had run. *Id.* at 898.

Although *Williams* involved the Suits in Admiralty Act rather than Title VII, it disposes of this case. Like the *Williams* plaintiff, Cooper did not file her action until the relevant statutory limitations period had almost expired. Again, like the *Williams* plaintiff, Cooper named the wrong party as the defendant and attempted to correct her error by amending her pleading so that it would relate back under rule 15(c). Thus, as in *Williams,* we find that Cooper's failure to notify the substitute defendant of the institution of her action until after the statutory period had run precludes the application of rule 15(c).

Cooper argues that she should be allowed to amend her complaint under rule 15(c) because the Postmaster General had informal notice of her claim within the statutory period. In making this argument, Cooper's reliance on our recent decision in *Korn* is misplaced. There, we indicated that "notice of the institution of the action" sufficient to allow substitution of a defendant under rule 15(c) could be informal as well as formal. 724 F.2d at 1399. Under the unique facts of that case, we determined that a ship's owners had adequate notice of an injured passenger's suit when notice of the action's institution was given to another entity with which there was a "sufficient community of interest." *Id.* at 1400-01. In the present case, Cooper contends that the Postmaster General had informal notice of her action because of USPS's participation in the administrative proceedings which preceded the filing of her Title VII action. This argument fails for two reasons. First, the filing of an administrative claim does not impute notice of "the institution of the action"—which is the only notice relevant to rule 15(c). *See Korn,* 724 F.2d at 1400; *Williams,* 711 F.2d at 898; *see also Archuleta v. Duffy's Inc.,* 471 F.2d at 35 ("We cannot say that knowledge of the existence of a potential [Title VII] action (gained through participation in administrative proceedings) constitutes, per se, reasonable grounds for notice of the institution of an action."). Second, even assuming there was a "sufficient community of interest" between the Postmaster General and the governmental parties who were eventually served, Cooper failed to give any of them notice of her action within the statutory period established by 42 U.S.C. § 2000e-16(c). She thus may not now assert the type of imputed notice we found in *Korn.*

III

We recognize that our literal interpretation of rule 15(c) and the short limitations period established by 42 U.S.C. § 2000e-16(c) combine to produce a seemingly harsh result in this case. Such apparently harsh results in individual cases, however, may be the inevitable corollary of our obligation in all cases to follow precedent and to implement controlling statutes and procedural rules. We may ignore neither the limitations on the filing of Title VII actions contained in section 2000e-16(c) nor the notice requirement for the substitution of parties in amended pleadings established by the plain language of rule 15(c). Whatever hardship these combined provisions work on Title VII plaintiffs can be alleviated only by Congress and the drafters of the Federal Rules of Civil Procedure.

To some extent, rule 15(c) already protects diligent parties litigating against the federal government. The rule's drafters specifically recognized that the relation back of pleadings amended to substitute new defendants was a "problem [that] has arisen most acutely in certain actions by private parties against officers or agencies of the United States." Fed. R. Civ. P. 15 advisory committee note on 1966 amendment. To remedy this problem, rule 15(c) was amended in 1966 to allow parties to give proper notice of the institution of an action by serving process on the "United States Attorney, . . . or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named . . . ." Fed. R. Civ. P. 15(c). Thus, Cooper could have preserved her Title VII action by serving a copy of the complaint on either the United States Attorney or the Attorney General before October 30, 1982. She failed to do so.

AFFIRMED.

APPENDIX B

United States District Court,
S.D. California

August 2, 1984

No. C 82-1475-T-(M)

KAREN A. COOPER, PLAINTIFF,

v.

UNITED STATES POSTAL SERVICE,
and DOES 1 through 50, inclusive,
DEFENDANT-APPELLEE

ORDER

HOWARD B. TURRENTINE, District Judge.

The Government moves to dismiss this complaint for lack of subject matter jurisdiction under Rule (b)(1), lack of personal jurisdiction under Rule 12(b)(2), and failure to state a claim upon which relief can be granted under Rule 12(b)(6). It moves in the alternative to strike under Rule 12(f) the allegations referring to 28 U.S.C. §§ 1343(3) and 1343(4), 42 U.S.C. §§ 1983 and 1985, plaintiff's prayer for injunctive relief, compensatory and punitive damages, and plaintiff's request for a jury trial. The Court need only concern itself with the motions to dismiss for lack of subject matter jurisdiction and failure to state a claim.

On December 1, 1980, plaintiff Karen Cooper filed a complaint for sex-based employment discrimination with the U.S. Postal Service's Department of Equal Opportunity. On September 30, 1982, Cooper received a letter

from the Department informing her of the claim's denial. In accord with 42 U.S.C. § 2000e-16(c), the notice informed Cooper that she was entitled to bring an action in federal court within thirty days of receipt. On October 29, 1982, one day before the running of the statute, Cooper filed a complaint under 42 U.S.C. §§ 1983, 1985, 1986 and 2000e-16(c) against the U.S. Postal Service and Does 1 through 50, inclusive. The papers do not disclose the date of service on the U.S. Postal Service; the U.S. Attorney, the U.S. Attorney General and the Postmaster General were served in January and February of 1983. Cooper does not deny that service of the complaint was not effected on any of the above parties during the thirty day period.

The government's motions to dismiss are based *inter alia* on the exclusive nature of 42 U.S.C. § 2000e-16(c) as a remedy for federal employment discrimination, and Cooper's failure to serve the proper party defendant within the thirty day time period set forth in the statute.

A. *Rule 12(b)(6) motion*

Counts 2, 3, 6, 7 and 8 of the complaint are pleaded under 42 U.S.C. §§ 1983, 1985 and 1986. Title VII, however, provides the exclusive remedy for federal employment discrimination. *Brown* v. *General Services Administration,* 425 U.S. 820, 835 (1976); *Mosley* v. *U.S.*, 425 F. Supp. 50, 54-55 (N.D.Cal. 1977). Therefore, the above counts should be dismissed.

B. *Rule 12(b)(1) motion*

Counts 1, 4 and 5 of the complaint are pleaded under Title VII of the Civil Rights Act of 1964. Under Title VII, the proper party defendant is the "head of the department,

agency or unit, as appropriate." 42 U.S.C. § 2000e-16(c); *Hackley* v. *Roudebush*, 17. U.S.App. D.C. 376, 520 F.2d 108, 115 n.17 (D.C.Cir. 1975); *Mosley* v. *U.S., supra.* Cooper named only the U.S. Postal Service and Does 1-50 as defendants. Hence, the above counts should also be dismissed.

Plaintiff requests that leave be granted to amend her complaint under Rule 15(c), and further, that such amendment relate back to the thirty day limitation period in the absence of a showing of prejudice by the Government. Relation back under Rule 15(c) requires, however, that actual notice be received by the Government within the period provided by law for commencing the action. *Stewart* v. *U.S.*, 655 F.2d 741, 742 (7th Cir. 1981); *see also Craig* v. *U.S.*, 413 F.2d 854, 857-858 (9th Cir.), *cert. denied,* 396 U.S. 987 (1969). Such notice must comply with Rules 4(d)(4) and (5). *Advisory Committee Note on Rule 15(c),* 39 F.R.D. 82, 83 (1966). No notice, formal or informal, was provided to the Government within the thirty day period. Moreover, application of Rule 15(c) in the absence of proper notice within the limitations period would result in prejudice by eliminating the Government's statute of limitations defense. *Wood* v. *Worachek,* 618 F.2d 1225, 1229 (9th Cir. 1980). Hence, leave to amend under Rule 15(c) is denied.

ACCORDINGLY, IT IS HEREBY ORDERED that the complaint is dismissed in its entirety with prejudice.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-6106
DC CV 82-1475 HBT

KAREN A. COOPER, PLAINTIFF/APPELLANT

v.

U.S. POSTAL SERVICE, DEFENDANT/APPELLEE

APPEAL from the United States District Court for the Southern District of California.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered JULY 12, 1983

APPENDIX D

United States Postal Service
Western Regional Office
San Bruno, CA 94099-0001

EEO# 5-1-0153-1

Certified #7529630
Return Receipt Requested

Sept. 24, 1982

Ms. Karen A. Cooper
1663 Oliver Avenue
San Diego, California 92109

Dear Ms. Cooper:

Reference is made to your complaint of discrimination filed with the EEO Branch, U.S. Postal Service, Western Regional Headquarters, San Bruno, California on December 1, 1980, against the San Diego, California Post Office.

The complaint was accepted and assigned for investigation on August 19, 1981. You were provided a copy of the investigative report May 17, 1982 and an informal adjustment attempt was conducted in August, 1982. You were advised of the District Manager's proposed disposition of your complaint by letter dated September 3, 1982. The disposition letter specifically set forth time limits for appeal, and it was received by you on September 7, 1982.

The time limits for appeal expired on September 22, 1982. To this date, you have not responded. Therefore, in

accordance with EEOC Regulations, I have adopted as the final agency decision the recommended finding of no discrimination as outlined in the September 3, 1982 notice of proposed disposition. Your case is now closed on the present record with a finding of no physical handicap and sex discrimination.

If you are dissatisfied with this final decision, you have the following appeal rights:

You may appeal to the Equal Employment Opportunity Commission within 20 calendar days of receipt of the decision.

Your appeal should be addressed to the Office of Review and Appeals, Equal Employment Opportunity Commission, 2401 E Street, N.W., Washington, D.C. 20506. The appeals and any representations in support thereof must be submitted in duplicate.

The Equal Employment Opportunity Commission appeal time limit regulation under 29 CFR Part 1613 is: 1613.233 Time Limit: (a) Except as provided in paragraph (b) of this section, a complainant may file a notice of appeal at any time up to 20 calendar days after receipt of the agency's notice of final decision on his or her complaint. An appeal shall be deemed filed on the date it is postmarked, or in the absence of a postmark, on the date it is received by the Commission. Any statement or brief in support of the appeal must be submitted to the Commission and to the defendant agency within 30 calendar days of filing the notice of appeal. For purposes of this Part, the decision of an agency shall be final only when the agency makes a determination on all of the issues in the complaint, including whether or not to award attorney's fees or costs. If a determination to award attorney's fees or costs is made, the decision will not

be final until procedure is followed for determining the amount of the award as set forth in 1613.271(c).

(b) The 20-day time limit within which a notice of appeal must be filed will not be extended by the Commission unless, based upon a written statement by the complainant showing that he or she was not notified of the prescribed time limit and was not otherwise aware of it or that circumstances beyond his or her control prevented the filing of a Notice of Appeal within the prescribed time limit, the Commission exercises its discretion to extend the time limit and accept the Appeal.

In lieu of an appeal to the Commission, you may file a civil action in an appropriate U.S. District Court within 30 days of receipt of the decision.

If you elect to appeal to the Commission's Office of Review and Appeals, you may file a civil action in a U.S. District Court within 30 days of receipt of the Commission's final decision.

A civil action may also be filed anytime after 180 days of the date of the initial appeal to the Commission, if a final decision has not been rendered.

Joseph R. Caraveo
Regional Postmaster General

cc: Sexton Associates (by Certified #7529631)
J. Ron Sexton
330 Kalmia Street
San Diego, CA 92101

cc: District Manager, Sunland
Postmaster, San Diego, CA
EEO Specialist, Sunland

bcc: 231/orig/fltr/c/r
WE231:JStribling:hm:09/24/82

No. 84-600

In the Supreme Court of the United States

OCTOBER TERM, 1984

KAREN A. COOPER, PETITIONER

v.

UNITED STATES POSTAL SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

ROBERT S. GREENSPAN
MARILYN S. G. URWITZ
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the court of appeals correctly held that petitioner's attempt to amend her complaint nearly eight months after it was filed in order to name the proper governmental defendant did not relate back to the date on which the complaint was filed, because petitioner had failed to satisfy the requirements specified in Fed. R. Civ. P. 15(c) for relation back in situations in which a plaintiff fails to name the proper federal officer as the defendant.

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In the Supreme Court of the United States

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No. 84-600

KAREN A. COOPER, PETITIONER

v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A8) is reported at 740 F.2d 714. The opinion of the district court (Pet. App. A9-A11) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A12) was entered on July 12, 1984, and the petition for a writ of certiorari was filed on October 30, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND RULE INVOLVED

1. Section 717(c) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16(c), provides in pertinent part:

> Within thirty days of receipt of notice of a final action taken by a department, agency, or unit * * * an employee or applicant for employment, if aggrieved by the final disposition of his complaint * * *, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

2. Rule 15(c) of the Fed. R. Civ. P. provides:

> *Relation Back of Amendments.* Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.
>
> The delivery or mailing of process to the United States Attorney, or his designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

STATEMENT

1. In December 1980, petitioner filed an administrative complaint with the Western Regional Headquarters of the United States Postal Service alleging that she had been denied a part-time regular carrier position because of her sex, in violation of Section 717(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16(a). Pet. App. A2, A13. On September 30, 1982, petitioner received a letter from the Regional Postmaster General informing her that because she had not responded to the proposed denial of her complaint within the time specified in applicable regulations and the notice of proposed denial, her complaint was denied. *Id.* at A2, A13-A15. The letter informed her that she either could appeal this decision to the Equal Employment Opportunity Commission (EEOC) within 20 days or, in lieu of such an appeal, could file a civil action in the appropriate district court within 30 days of her receipt of the decision. *Id.* at A14-A15.

Under Section 717(c) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16(c), "[w]ithin thirty days of receipt of notice of final action" by a federal department or agency on a complaint of discrimination, an employee or applicant for employment aggrieved by the action "may file a civil action * * *, in which civil action the head of the department [or] agency * * * shall be the defendant." On October 29, 1982, one day before this 30-day period expired, petitioner, represented by counsel, filed a complaint in the

United States District Court for the Southern District of California pursuant to Section 717(c). However, she named as the sole defendant the Postal Service, rather than the Postmaster General, who is the head of the federal agency concerned and therefore is, under the statute, the only proper defendant in a Title VII suit. She did not serve copies of the complaint on the United States Attorney or the Attorney General until January 1983 or on the Postmaster General until February 1983. The record does not indicate when the Postal Service was served, but petitioner has conceded that such service did not occur within the 30-day period that expired on October 30, 1982. Pet. App. A2, A10.

On April 5, 1983, the government moved to dismiss the complaint on the ground that petitioner had not named the Postmaster General as the defendant, as required by Section 717(c). On June 20, 1983, petitioner moved to amend her complaint to substitute the Postmaster General as the defendant and to have that amendment relate back under Fed. R. Civ. P. 15(c) to the date on which the complaint was filed. The district court denied petitioner's motion. The court explained that the Postmaster General had not received notice of the institution of the suit within 30 days after petitioner's receipt of the administrative denial of her complaint and thus had not received such notice "within the period provided by law for commencing the action against him," as required by clause (1) of Rule 15(c) in order for the amendment naming a new defendant to relate back. The district court accordingly granted the government's motion to dismiss the complaint. Pet. App. A9-A11.

2. The court of appeals affirmed (Pet. App. A1-A8). The court noted that in its prior decision in *Williams* v. *United States*, 711 F.2d 893 (9th Cir. 1983), the plaintiff had filed a suit under the Suits in Admiralty Act against the Federal Aviation Administration seven days before the statutory period for filing the suit was to expire. In *Williams*, the court of appeals held that the district court had properly denied the plaintiff's motion under Rule 15(c) to name the United States as the defendant because the United States did not receive notice of the action until one day after the statutory filing period had run. 711 F.2d at 898. The court of appeals concluded that the same result must obtain here, because petitioner failed to notify the proper defendant (the Postmaster General) of the institution of the suit until after the applicable 30-day filing period had run and the amendment of the complaint therefore could not relate back under Rule 15(c).

The court of appeals explained that although the result might seem harsh in this particular case, that result was "the inevitable corollary of [the court's] obligation in all cases to follow precedent and to implement controlling statutes and procedural rules," since it could "ignore neither the limitations on the filing of Title VII actions contained in section 2000e-16(c) nor the notice requirement for the substitution of parties in amended pleadings established by the plain language of rule 15(c)" (Pet. App. A7). The court observed that Rule 15(c) had been amended in 1966 specifically to afford relief to "diligent parties litigating against the federal government" (Pet. App. A8): under the second paragraph of Rule 15(c), which was added by the 1966 amend-

ments, a party may give the necessary notice of the institution of the action within the time allowed by delivering or mailing process to the United States Attorney, the Attorney General, or the federal agency or officer who would have been a proper party if named. "Thus," the court concluded, "[petitioner] could have preserved her Title VII action by serving a copy of the complaint on either the United States Attorney or the Attorney General before October 30, 1982," but "[s]he failed to do so" (Pet. App. A8).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. Review by this Court therefore is not warranted. Although petitioner relies on this Court's decision in *Baldwin County Welcome Center* v. *Brown*, No. 83-131 (Apr. 16, 1984), the Court's opinion in that case undermines rather than supports her position, because the Court there made clear that compliance with the Federal Rules of Civil Procedure is required in a suit under Title VII just as in any other civil action.

1. a. Petitioner first contends (Pet. 7, 8-10, 12-13) that the Court should grant review in this case to consider whether compliance with the 30-day period within which a suit must be filed against the head of a federal agency under Title VII is jurisdictional or whether that period is subject to waiver, estoppel, or equitable tolling. Contrary to petitioner's contention, however, this case simply does not present that issue.

Petitioner in fact *did* file a complaint within 30 days of her receipt of the notice of final agency action. Accordingly, neither the district court nor the

court of appeals held that dismissal of her suit was required because the doctrines of waiver, estoppel, and equitable tolling are inapplicable in a federal sector Title VII suit. By contrast, the appellate decisions indicating that the 30-day period in Section 717(c) is not jurisdictional in nature—and which, according to petitioner, conflict with the decision below—deal expressly with situations in which the plaintiff did *not* file an action within 30 days of receipt of the final agency action. See *Martinez* v. *Orr*, 738 F.2d 1107 (10th Cir. 1984); *Milam* v. *United States Postal Service*, 674 F.2d 860 (11th Cir. 1982).[1] Because petitioner filed a complaint within 30 days, the only issue presented is whether Fed. R. Civ. P. 15(c) permitted her to amend that complaint to name a party who was not notified of the action until months later. See pages 14-24, *infra*. The court of appeals understood the case to be limited in precisely that manner: it stated that the "only issue" before it was whether Rule 15(c) should be interpreted to permit the amendment of the complaint naming the Postmaster General to relate back (Pet. App. A4). Contrary to petitioner's assertion (Pet. 9, 12), the court did not suggest that its answer to that question de-

[1] Petitioner also maintains (Pet. 8) that *Sessions* v. *Rusk State Hospital*, 648 F.2d 1066 (5th Cir. 1981), and *Saltz* v. *Lehman*, 672 F.2d 207 (D.C. Cir. 1982), conflict with the ruling here. As petitioner acknowledges, however, *Sessions* does not involve a construction of Section 717(c) at all, but instead addresses the 90-day limitation applicable under Section 706(f) of Title VII, 42 U.S.C. 2000e-5(f), in suits against private employers and state and local governments. Nor does the District of Columbia Circuit's decision in *Saltz* concern the suit-filing limitation of Section 717(c); it deals only with the time period for filing an *administrative charge*. See 29 C.F.R. 1613.214(a).

pended on whether the 30-day suit-filing is jurisdictional in nature. The court made clear that if the requirements of Rule 15(c) had been satisfied, it would have held that the amendment related back even though the 30-day filing period is regarded by the Ninth Circuit as jurisdictional.[2]

b. In any event, even if this case could be thought to present the question whether compliance with the 30-day period for filing suit under Section 717(c) is jurisdictional in nature, that issue does not warrant review by this Court. Indeed, the Court recently denied certiorari in another case in which the petitioner sought review on precisely the same issue, *Stuckett* v. *United States Postal Service*, No. 83-6839 (Oct. 9, 1984), and there is no reason for a different result here.

The conclusion that compliance with the 30-day time limit in Section 717(c) is a jurisdictional prerequisite to suit is supported by principles firmly established by numerous decisions of this Court. It is axiomatic that " 'the United States, as sovereign, "is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit" ' " (*Lehman* v. *Nakshian*, 453 U.S. 156, 160 (1981), quoting *United States* v. *Testan*, 424 U.S. 392, 399 (1976), and *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941)). As with any condition placed

[2] The court of appeals did cite its prior decision in *Rice* v. *Hamilton Air Force Base Commissary*, 720 F.2d 1082, 1083 (9th Cir. 1983), noting in parentheses the holding in that case that the "thirty day limit is jurisdictional" (Pet. App. A3-A4). But the court cited the *Rice* decision for the proposition that Section 717(c) "gives federal employees only thirty days after receiving notice of final agency action on their claim in which to file suit" (Pet. App. A3). That proposition, of course, is evident on the face of Section 717(c).

on a suit against the sovereign, "this Court has long decided that limitations * * * upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied" (*Soriano* v. *United States*, 352 U.S. 270, 276 (1957)). See also *Munro* v. *United States*, 303 U.S. 36, 41 (1938); *United States* v. *Kubrick*, 444 U.S. 111, 117-118 (1979). Only two Terms ago, the Court reaffirmed that "[w]hen waiver legislation contains a statute of limitations, the limitations provision constitutes a condition on the waiver of sovereign immunity" that must be "strictly observed" (*Block* v. *North Dakota*, 461 U.S. 273, 287 (1983)).

In light of these principles, limitations periods in statutes waiving the sovereign immunity of the United States may not be waived or tolled by a court unless Congress has explicitly so provided. See *Munro* v. *United States*, 303 U.S. at 41; *Soriano* v. *United States*, 352 U.S. at 275-276. Similarly, the notion that the United States might be equitably estopped from invoking a statutory limitations period is inconsistent with this Court's numerous decisions holding that the United States may not be estopped by the acts of its agents. See, *e.g.*, *Heckler* v *Community Health Services of Crawford County, Inc.*, No. 83-56 (May 21, 1984), slip op. 8 & nn.11, 12. Indeed, this Court has twice rejected contentions that the government was equitably estopped from invoking applicable time limits prescribed by Congress. *Schweiker* v. *Hansen*, 450 U.S. 785 (1981); *INS* v. *Hibi*, 414 U.S. 5 (1973). This unbroken line of authority clearly indicates that the 30-day limit in section 717(c) is a condition placed on the consent to suits against the federal government and thus " ' "define[s] [the district court's] jurisdiction to entertain

the suit" ' " (*Lehman* v. *Nakshian*, 453 U.S. at 160, quoting *United States* v. *Testan*, 424 U.S. at 399, and *United States* v. *Sherwood*, 312 U.S. at 586). See also *Soriano* v. *United States*, 352 U.S. at 271, 273.

c. Petitioner does not mention, much less discuss, these settled principles of sovereign immunity. Instead, she argues (Pet. 7, 8, 12-13) that this Court's decisions in *Zipes* v. *Trans World Airline, Inc.*, 455 U.S. 385 (1982), and *Baldwin County Welcome Center* v. *Brown*, *supra*, require the conclusion that the 30-day limit in Section 717(c) may be tolled or waived by a court. This argument is without merit.

In *Zipes*, the Court held that compliance with Section 706(e) of Title VII, which requires an employee in the *private* sector to file an administrative charge of discrimination with the EEOC within 180 days of the alleged discriminatory act, is not a jurisdictional prerequisite to the subsequent bringing of a civil action in federal district court pursuant to Section 706(f) (455 U.S. at 393). Instead, the Court held that the provision is "like a statute of limitations, * * * subject to waiver, estoppel, and equitable tolling" (*ibid.* (footnote omitted)). *Zipes*, however, is inapposite here. As the Seventh Circuit has observed, "[b]ecause *Zipes* involved a private defendant, we do not think that its holding may be extended to the case at bar, where principles of sovereign immunity control" (*Sims* v. *Heckler*, 725 F.2d 1143, 1145 (1984)). See also *Soriano* v. *United States*, 352 U.S. at 275 (reliance on tolling rule announced in another case "is misplaced [since] [t]hat case involved private citizens, not the Government. It has no applicability to claims against the sovereign."). Cf. *Brown* v. *GSA*, 425 U.S. 820, 833 (1976). The Court in *Baldwin County Welcome Center* simply reiterated the *Zipes* ruling. *Baldwin County Welcome Center*,

slip op. 5 n.6.[3] That decision therefore likewise does not suggest that the distinct 30-day period prescribed by Section 717(c) for filing a Title VII suit against the federal government is not jurisdictional in nature.

d. Petitioner also suggests (Pet. 8-9, 13) that review is warranted because there is a conflict among the circuits on the question whether the suit-filing period under Section 717(c) is jurisdictional in nature. She relies on *Saltz* v. *Lehman*, 672 F.2d 207 (D.C. Cir. 1982); *Milam* v. *United States Postal Service*, 674 F.2d 860 (11th Cir. 1982); and *Martinez* v. *Orr*, 738 F.2d 1107 (10th Cir. 1984).[4] The existence of those decisions, however, would not warrant review here even if this case actually involved the question of whether the 30-day period is subject to waiver, tolling, or equitable estoppel. In none of the three cases petitioner cites did the court consider the significance of the principles of sovereign immunity discussed above. *Saltz*, 672 F.2d at 208; *Milam*, 674 F.2d at 862; *Martinez*, 738 F.2d at 1110.

Moreover, these three cases all involved circumstances quite different from those presented here. Unlike this case, which involves the time period for filing

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[3] The Court did not expressly state that the 90-day limitation in Section 706(f)(1) on bringing a Title VII suit against a private employer also is not jurisdictional in nature, although it did indicate that the 90-day limitations period might likewise be subject to equitable tolling in appropriate circumstances. Slip op. 4-5.

[4] Petitioner also asserts (Pet. 8) a conflict with *Sessions* v. *Rusk State Hospital*, 648 F.2d 1066 (5th Cir. 1981). But as we have explained (see note 1, *supra*), that case did not involve a suit against the federal government, and it therefore has no bearing on the issue presented here.

a *judicial* action in district court, *Saltz* involved the time limit for filing an *administrative* charge with the agency. A court might view differently the time limit for filing an action in district court, because the latter is most clearly a condition on the waiver of sovereign immunity to *suit* (see *Cooper* v. *Bell*, 628 F.2d 1208, 1213 n.10 (9th Cir. 1980)), and in fact the District of Columbia Circuit, which decided *Saltz*, previously had held that the 30-day suit-filing period is jurisdictional in nature. *Hofer* v. *Campbell*, 581 F.2d 975, 977 (1978), cert. denied, 440 U.S. 909 (1979).

Although the Eleventh Circuit's decision in *Milam* does contain language to the effect that the 30-day period is not jurisdictional (674 F.2d at 862), that language is dicta. In *Milam*, the 30th day for filing a Title VII suit fell on a Sunday and the complaint was filed on Monday, the 31st day. The court simply held that because the last day of the 30-day period fell on a Sunday, under Fed. R. Civ. P. 6(a), the deadline for filing must be considered to have been Monday. Thus, the complaint in *Milam* was in effect timely filed within the 30-day limit prescribed by Section 717(c). The same result presumably would obtain even if the 30-day suit-filing period is regarded as jurisdictional. Cf. Sup. Ct. R. 29.1.

Finally, in *Martinez* v. *Orr*, *supra*, the Tenth Circuit did hold that Section 717(c) is not jurisdictional and could be equitably tolled in the circumstances of that case, because, in the court's view, the EEOC had misled the plaintiff in its notice of a right to sue. See 738 F.2d at 1110-1112. There is no suggestion here that the government misled petitioner into failing to name the proper defendant—a requirement that, at all events, is clear from the face of the Act. Moreover, as we explained in our Supplemental Brief in *Stuckett* v. *United States Postal Service*, *supra*,[5] the Solicitor General decided not to seek rehearing en banc in *Martinez* because the EEOC informed us that it had revised its practices to eliminate the potential for misleading the employee in the manner the Tenth Circuit identified, and the particular issue involved in *Martinez* therefore was of no continuing importance. But as we also stated in our Supplemental Brief in *Stuckett*, should the tolling issue arise again in the Tenth Circuit in another setting that appeared to be of broader importance, we would consider requesting the Tenth Circuit to reconsider the holding in *Martinez*. For these reasons, it was not clear that any circuit conflict would persist or was of sufficient importance to warrant review by this Court. Against this background, the Court denied the petition for a writ of certiorari in *Stuckett* less than three months ago. There have been no intervening events since then, and there are no other factors present here that would warrant a different disposition in this case.

e. This case would not be in any event a suitable vehicle in which to address the nature of the 30-day filing period prescribed by Section 717(c), because petitioner has suggested no basis on which her failure to file a proper complaint within that 30-day period could be excused on equitable grounds. Nor did she do so in the district court or court of appeals. Petitioner likewise did not, in the courts below, contest the proposition that the 30-day suit-filing period is jurisdictional in nature. Petitioner's efforts to interject that issue into the case at this late date should be rejected.

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[5] We have furnished counsel for petitioner with copies of our briefs in *Stuckett*.

Moreover, even if it is assumed that equitable tolling principles might be applicable in a Title VII suit against the federal government in certain circumstances, there are no such circumstances here. Like *Baldwin County Welcome Center*, "[t]his is not a case in which a claimant has received inadequate notice; or where a motion for appointment of counsel is pending and equity would justify tolling the statutory period until the motion is acted upon; or where the court has led the plaintiff to believe that she had done everything required of her [; * * * or] where affirmative misconduct on the part of a defendant lulled the plaintiff into inaction." Slip op. 4-5 (citations omitted). Section 717(c) on its face specifies the proper defendant, and there is, quite simply, no excuse for the failure by petitioner, who was represented by counsel, to comply with that explicit requirement.

2. Petitioner also contends (Pet. 10-12, 14-16) that the Court should grant certiorari to review the court of appeals' interpretation of Rule 15(c) in the particular circumstances of this case. Petitioner does not contest the holding by the courts below that the Postmaster General was the only proper defendant in this Title VII suit. Nor could she contest that holding, since Section 717(c) explicitly states that the head of the department or agency "shall be the defendant,"[6] and numerous lower court decisions

[6] Congress has not enacted a law permitting agencies to be named as parties defendant in employment discrimination suits, and it is "well established that federal agencies are not subject to suit *eo nomine* unless so authorized by Congress in 'explicit language.'" *Midwest Growers Cooperative Corp.* v. *Kirkemo*, 533 F.2d 455, 465 (9th Cir. 1976). See *Blackmar* v. *Guerre*, 342 U.S. 512, 515 (1952).

unanimously so hold.[7] Petitioner instead argues that her motion to amend the complaint to name the proper defendant, which was filed almost eight months after the original complaint and long after the 30-day period for filing suit had expired, should have related back to the date the complaint was filed. The court of appeals correctly rejected that argument, and its holding does not warrant review.

a. Under Fed. R. Civ. P. 15(c), an amendment changing the party against whom a claim is asserted relates back only if, "within the period provided by law for commencing an action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him." In this case, the Postmaster General (the proper defendant "to be brought in by amendment") did not receive notice of the institution of the

[7] See, *e.g.*, *Canino* v. *EEOC*, 707 F.2d 468, 472 (11th Cir. 1983); *Hall* v. *SBA*, 695 F.2d 175, 180 (5th Cir. 1983); *White* v. *GSA*, 652 F.2d 913, 916 n.4 (9th Cir. 1981); *Neubold* v. *United States Postal Service*, 614 F.2d 46, 47 (5th Cir.), cert. denied, 449 U.S. 878 (1980); *Davis* v. *Califano*, 613 F.2d 957, 958 n.1 (D.C. Cir. 1979); *Hackley* v. *Roudebush*, 520 F.2d 108, 115 n.17 (D.C. Cir. 1975); *Lage* v. *Thomas*, 585 F. Supp. 403, 405 (N.D. Tex. 1984); *Langster* v. *Schweiker*, 565 F. Supp. 407, 412 (N.D. Ill. 1983); *Quillen* v. *United States Postal Service*, 564 F. Supp. 314, 321 (E.D. Mich. 1983); *Munoz* v. *Orr*, 559 F. Supp. 1017, 1020 (W.D. Tex. 1983); *Weiss* v. *Marsh*, 543 F. Supp. 1115, 1117 (M.D. Ala. 1981); *Mosley* v. *United States*, 425 F. Supp. 50, 54-55 (N.D. Cal. 1977); *Jones* v. *Brennan*, 401 F. Supp. 622, 627 (N.D. Ga. 1975).

action "within the period provided by law for commencing an action against him"—*i.e.*, within the 30-day period provided under Section 717(c) for a federal employee to file a Title VII suit. Petitioner received the notice of the administrative denial of her complaint on September 30, 1982, and the 30-day suit-filing period therefore expired on October 30, 1982. Yet, petitioner did not serve the Postmaster General with a copy of the complaint until February 1983, almost four months after the 30-day period expired, and there is no indication that the Postmaster General otherwise received actual notice of the suit within the 30-day period.[8] The plain language of Rule 15(c) therefore refutes petitioner's contention that the attempted amendment of the complaint should have related back.

It also is significant that petitioner failed to comply with the provisions of Rule 15(c) that are specifically intended to afford a means by which a person suing the federal government can protect himself against the consequences of naming the wrong defendant. Under the second paragraph of Rule 15(c), "[t]he delivery or mailing of process to the United States Attorney, or his designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirements of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a

[8] Even if notice to the Postal Service could be deemed notice to the Postmaster General for these purposes, petitioner has conceded that the Postal Service likewise was not served with a copy of the complaint within the 30-day period, and the record does not disclose when, or even if, the Postal Service otherwise was served. See Pet. App. A2, A10.

defendant." Accordingly, if the delivery or mailing of process to any of those persons is accomplished "within the period provided by law for commencing the action against [the proper defendant]," an amendment of the complaint to name the proper defendant will relate back to the date of the filing of the complaint.

In this case, however, petitioner neither delivered nor mailed process to the United States Attorney, the Attorney General, or the Postmaster General (the "officer who would have been a proper defendant if named") within the 30-day period provided by Section 717(c) for commencing a Title VII action against the Postmaster General. Petitioner did not serve copies of the complaint on the Attorney General and United States Attorney until January 1983, well after the 30-day period expired on October 30, 1982, and, as noted above, she did not serve the Postmaster General until even later, in February 1983 (Pet. App. A2, A10). The court of appeals therefore correctly held that petitioner's amendment of the complaint on June 20, 1983 to name the Postmaster General could not relate back to the date of the filing of the original complaint on October 29, 1982. This holding is consistent with the decisions of the Ninth Circuit and every other court of appeals that has considered the identical relation-back question where the plaintiff has named the wrong federal agency or officer as the defendant. See *Williams* v. *United States*, 711 F.2d 893, 898 (9th Cir. 1983); *Hughes* v. *United States*, 701 F.2d 56, 58-59 (7th Cir. 1982); *Stewart* v. *United States*, 655 F.2d 741, 742 (7th Cir. 1981); *Carr* v. *Veterans Administration*, 522 F.2d 1355, 1357-1358 (5th Cir. 1975); *Evans* v. *United States Veterans Administration Hos-*

pital, 391 F.2d 261 (2d Cir. 1968), cert. denied, 393 U.S. 1040 (1969).

Petitioner makes no effort to answer this interpretation of Rule 15(c) in a suit against a federal agency or officer. She instead seeks to denigrate that requirement as a "procedural technicalit[y]" (Pet. 9, 15) and suggests that the court of appeals should have ignored it in order to enable her to vindicate her civil rights. But as this Court stressed in *Baldwin County Welcome Center*, *supra*, there is no basis "for giving Title VII actions a special status under the Rules of Civil Procedure" (slip op. 3). Nor can rules pertaining to the proper parties to a suit be dismissed as mere technicalities. It is the named defendant who will be bound by the judgment if the plaintiff prevails. Moreover, where, as in Title VII, Congress has created a cause of action against the federal government and specified the federal officer against whom it must be brought, the courts may not decline to enforce that requirement because of their own views regarding appropriate pleading practice.

b. Petitioner also ignores the fact that the second paragraph was added to Rule 15(c) in 1966 to address precisely the situation presented here. The courts below properly rejected the petitioner's efforts to obtain relief that goes well beyond that afforded by the 1966 amendment.

As petitioner concedes (Pet. 14-16), Rule 15(c) was amended in 1966 in response to four district court decisions that dismissed suits brought pursuant to Section 205(g) of the Social Security Act, 42 U.S.C. 405(g), seeking judicial review of the denial of Social Security benefits. In each case, the claimant had named a federal defendant other than the Secretary of Health, Education, and Welfare, who was the

only proper defendant in such an action.[9] When they discovered their mistakes, the plaintiffs sought to amend their complaints to name the proper defendant, the incumbent Secretary. But by that time the 60-day period within which to file a suit under 42 U.S.C. 405(g) had expired, and the courts denied leave to amend on the ground that such an amendment would have constituted the commencement of a new action. See Byse, *Suing the "Wrong" Defendant in Judicial Review of Federal Administrative Action: Proposals for Reform*, 77 Harv. L. Rev. 40 (1963).

It was against this background that Rule 15(c) was amended to provide that in a suit against the United States or an officer or agency thereof, an amendment to name the proper defendant would relate back if "within the period provided by law for commencing the action" against the proper federal defendant, process was delivered or mailed to the Attorney General, the United States Attorney, or an agency or officer who would have been a proper defendant if named.[10] Kaplan, *Continuing Work of the Civil Com-*

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[9] The claimants named as defendants: the United States, the Department of HEW, the Federal Security Administration, and a former Secretary who had retired from office. See *Cohn* v. *Federal Security Administration*, 199 F. Supp. 884 (W.D.N.Y. 1961); *Hall* v. *Department of HEW*, 199 F. Supp. 833 (S.D. Tex. 1960); *Sandridge* v. *Folsom, Secretary of HEW*, 200 F. Supp. 25 (M.D. Tenn. 1959); *Cunningham* v. *United States*, 199 F. Supp. 541 (W.D. Mo. 1958).

[10] The second paragraph of Rule 15(c) provides that clauses (1) and (2) of the first paragraph are deemed satisfied if process was mailed or delivered to any of the officers described in the text. The first paragraph of Rule 15(c) requires that clauses (1) and (2) be satisfied "within the period provided by law for commencing the action against [the proper defend-

mittee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 Harv. L. Rev. 356, 407-410 (1967). There is no suggestion in the Rule that it was intended to permit relation back of an amendment naming the proper federal defendant where, as here, process was not delivered or mailed to the Attorney General, the United States Attorney, or the proper defendant "within the period for commencing the action," but only some months *after* the expiration of that period. To the contrary, the Advisory Committee notes to the 1966 amendments to Rule 15(c) state that in the four Social Security Act cases that had given rise to the amendments that specifically address relation back in suits against federal defendants, "the government was put on notice of the claim *within* the stated period—in the particular instances, by means of initial delivery of process to a responsible government official (see Rule 4(d)(4) and (5))." Fed. R. Civ. P. 15 advisory committee note (emphasis added).

c. In urging this Court to grant certiorari, petitioner relies (Pet. 10-12, 15-16) on decisions of the Second, Fifth, and Sixth Circuits and contends that the judgment below conflicts with those decisions. See *Ingram* v. *Kumar*, 585 F.2d 566 (2d Cir. 1978), cert. denied, 440 U.S. 940 (1979); *Kirk* v. *Cronvich*, 629 F.2d 404 (5th Cir. 1980); and *Ringrose* v. *Engelberg Huller Co.*, 692 F.2d 403 (6th Cir. 1982). Petitioner contends that under these decisions, it is not necessary that the proper defendant actually receive notice of the commencement of the action within the statutory period for commencing an action; in petitioner's

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ant]," and therefore requires that delivery or mailing of process to any of the federal officials specified in the second paragraph occur within that period.

view, if that defendant receives notice through service of process within a "reasonable time" after the statute of limitations has run or the complaint was filed, the requirements of Rule 15(c) should be deemed satisfied. Petitioner's reliance on the Sixth Circuit's decision in *Ringrose* is wholly misplaced, because the majority in that case expresly did not reach this issue and instead remanded for consideration of whether the defendant had received notice *within* the limitations period. 692 F.2d at 405. Only the concurring opinion of Judge Jones addressed the question petitioner raises. *Id.* at 406-412. For this reason, there clearly is no conflict between the decision below and the Sixth Circuit's decision in *Ringrose*.

There likewise is no conflict with the decisions of the Second and Fifth Circuits. *Ingram* v. *Kumar*, *supra*, was a malpractice action against a physician brought under the district court's diversity jurisdiction, and the state statute of limitations therefore was applicable. The Second Circuit acknowledged that the requirement in Rule 15(c) that the proper defendant receive actual notice within the period prescribed by law for commencing the action against him "seems to mean the applicable statute of limitations period" (585 F.2d at 571), but it concluded that this interpretation need not apply in jurisdictions where timely service of process may be affected after the statute of limitations has run (*id.* at 572). Similarly, in *Kirk* v. *Cronvich*, *supra*, which was an action under 42 U.S.C. 1983 against a state sheriff and therefore was also governed by a state statute of limitations, the court simply followed *Ingram* without extended analysis (629 F.2d at 408).

Even with regard to suits against non-federal parties, as in *Ingram* and *Kirk*, the Second and Fifth

Circuits are in a distinct minority. Six other courts of appeals have taken a contrary view and held that such a defendant sought to be brought in by the amendment must have received notice within the period of the statute of limitations,[11] as the plain language of the first paragraph of Rule 15(c) requires. See Note, *Federal Rule of Civil Procedure 15(c): Relation Back of Amendements*, 57 Minn. L. Rev. 83, 103-105 (1972). But whatever the proper resolution of any conflict between *Ingram* and *Kirk* and the decisions of the six other courts of appeals, that conflict has no bearing on the instant case.

Neither *Ingram* nor *Kirk* involved a suit against a *federal* agency or officer that was governed by the special notice provisions in the second paragraph of Rule 15(c) and by a congressionally prescribed *federal* limitation, such as that in Section 717(c) of the Civil Rights Act of 1964, on the period within which a suit may be brought. Whatever the legitimacy in a suit against a non-federal party of extending a state statute of limitations to include a reasonable time for service of process, on the theory that the

[11] See *Holden* v. *Massachusetts Commission Against Discrimination*, 671 F.2d 30, 37-38 (1st Cir. 1982); *Hernandez Jimenez* v. *Calero Toledo*, 604 F.2d 99, 102-103 (1st Cir. 1979); *Britt* v. *Arvanitis*, 590 F.2d 57, 62 (3d Cir. 1978); *Varlack* v. *SWC Caribbean, Inc.*, 550 F.2d 171, 174-175 (3d Cir. 1977); *Wood* v. *Worachek*, 618 F.2d 1225, 1229-1230 (7th Cir. 1980); *Trace X Chemical, Inc.* v. *Gulf Oil Chemical Co.*, 724 F.2d 68, 70 (8th Cir. 1983); *McCurry* v. *Allen*, 688 F.2d 581, 584-585 (8th Cir. 1982); *Korn* v. *Royal Caribbean Cruise Line, Inc.*, 724 F.2d 1397, 1400-1401 (9th Cir. 1984); *id.* at 1402 (Wallace, J., dissenting); *Craig* v. *United States*, 413 F.2d 854, 857-858 (9th Cir.), cert. denied, 396 U.S. 987 (1969); *Watson* v. *Unipress, Inc.*, 733 F.2d 1386, 1390 (10th Cir. 1984); *Archuleta* v. *Duffy's Inc.*, 471 F.2d 33 (10th Cir. 1973).

suit is not "commenced" against a party until service of process upon him (cf. *Walker* v. *Armco Steel Corp.*, 446 U.S. 740, 742-743 (1980)), there is no basis for extending a federal limitation period in a suit against a federal defendant in that manner. And, as noted above (see pages 17-18, *supra*), the only courts of appeals that have considered the question in the context of a suit against a federal defendant have held that the defendant must receive notice within the applicable limitations period.

Indeed, both the Second and Fifth Circuits, which decided *Ingram* and *Kirk*, previously had reached a different result in cases against the federal government. See *Evans* v. *United States Veterans Administration Hospital*, 391 F.2d 261 (2d Cir. 1968), cert. denied, 393 U.S. 1040 (1969); *Carr* v. *Veterans Administration*, 522 F.2d 1355 (5th Cir. 1975). In those cases, the court of appeals, relying upon Rule 15(c), held that the amendment to the complaint in a Federal Torts Claims Act (FTCA) suit to substitute the United States for the agency as the named defendant did *not* relate back to the date of the filing of the complaint because neither the United States nor any governmental entity on its behalf received actual notice of the suit within the two-year period provided under 28 U.S.C. 2401(b) for bringing an FTCA suit. *Evans*, 391 F.2d at 262; *Carr*, 522 F.2d at 1357-1358. In sum, there is no conflict among the courts of appeals on the application of Rule 15(c) to a suit against the federal government.

d. No doubt because of the explicit requirement in Section 717(c) of the Civil Rights Act of 1964 that the head of the department or agency be named as the defendant, the question presented in this case does not appear to have risen with much frequency in Title

VII suits.[12] Nor will petitioner suffer any prejudice from a denial of certiorari here. Petitioner held a full-time position with the Postal Service when she sought the part-time letter carrier's position. Because the part-time position would have resulted in reduced total pay, no back pay would be awarded in this case even if petitioner prevailed. In addition, we have been informed by the Postal Service that petitioner has now obtained a part-time position as a postal clerk and that, through counsel, she has informed the Postal Service that she no longer is interested in obtaining the part-time position as a letter carrier that was involved in this Title VII suit. For these reasons, all that remains at issue in this case is the question of attorney fees, and a major portion of those fees is attributable to work in the court of appeals and this Court that was made necessary only because of the attorney's own error in failing to name the proper party in the complaint. Even if the particular relation-back question otherwise warranted review, it would be more appropriate for the Court to consider the matter in a case in which there is actually something at stake for the Title VII plaintiff.

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[12] In her December 14, 1984 letter to the Clerk of this Court, petitioner cites three cases in the Southern District of California in which suits were dismissed on the authority of the Ninth Circuit's decision in this case. *Shen* v. *Lehman*, No. 83-362 (Nov. 28, 1984); *Alexander* v. *Lehman*, No. 82-1607 (Oct. 25, 1984); *Neff* v. *Lehman*, No. 83-0186 (Oct. 26, 1984). We have been informed by the United States Attorney, however, that the plaintiff in those cases was represented by the same law firm that represented petitioner in district court. There accordingly is no reason to believe that the error is common among other lawyers—or, indeed, that such a failure to comply with an explicit statutory standard might not provide a basis for a malpractice claim by a client prejudiced thereby.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

ROBERT S. GREENSPAN
MARILYN S. G. URWITZ
Attorneys

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No. 84-600

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

KAREN A. COOPER,
Petitioner,

vs.

UNITED STATES POSTAL SERVICE,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY BRIEF

THE EMPLOYMENT LAW CENTER
JOAN M. GRAFF
LINDA J. KRIEGER
Counsel of Record
PATRICIA A. SHIU
SUZANNE I. PRICE
Law Clerk
693 Mission Street, 7th Floor
San Francisco, CA 94105
(415) 495-6420
ELLEN LAKE
JEFFREY E. ESTES & ASSOCIATES
MARK F. CAROLIN

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

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PETITIONER'S REPLY TO OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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None of the arguments advanced by Respondent justify a denial of the Petition for Writ of Certiorari in this case. Both of the questions presented raise important issues of law as to which there exists a conflict between the circuits.

The Jurisdictional Issue

1.a. Despite Respondent's contention, this case does present the issue of whether the thirty-day period within which a suit must be filed under Section 717(c) of Title VII is jurisdictional. The Ninth Circuit below characterized the District Court's action as follows: "Cooper appeals from the dismissal of her Title VII complaint...The dismissal was based upon a lack of jurisdiction

because Cooper failed to file an action naming the proper defendant within the period provided by 42 U.S.C. section 2000e-16(c)." [Pet. App. A-1, emphasis added].

In affirming this jurisdictional decision, the Ninth Circuit stated: "In view of Cooper's conceded failure to file a complaint against the Postmaster General within the statutory period, her claim must be barred unless her attempt to substitute the Postmaster General as a defendant relates back to the date her original complaint was filed." [Pet. App. A-4]. These two statements make clear that the Ninth Circuit, like the District Court, treated the filing period as jurisdictional and ruled on that basis. The jurisdictional issue is squarely presented for review by this Court.

1.b and c. Respondent further argues that even if the filing period in section 2000e-16(c) is jurisdictional, this Court should not review the Ninth Circuit's decision because that decision is correct and does not conflict with this Court's prior decisions in Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982) or Baldwin County Welcome Center v. Brown, ___ U.S. ___, 104 S.Ct. 1723 (1984). Respondent bases this contention on the argument that, in cases against the federal government, principles of sovereign immunity prohibit application of equitable tolling principles to the limitations period contained in a statute waiving immunity unless Congress has otherwise provided. [Unprinted transcript of Respondent's Opposition, pp. 6-9]. Thus, Respondent argues, even if the filing period for

Title VII actions against private employers is subject to equitable tolling, the corresponding time period for section 717 actions is not. On this basis Respondent would distinguish Zipes, supra and Baldwin County Welcome Center, supra.

Respondent's argument contains a fatal flaw. In enacting section 717 of Title VII, Congress provided that federal employees complaining of employment discrimination should be afforded the same rights and procedural protections as are available to private sector employees. Martinez v. Orr, supra, 738 F.2d 1107, 1110; Parks v. Dunlop, 517 F.2d 785, 787 (5th Cir. 1975). Congress specifically provided that federal employee suits brought under section 717 should be governed by the same

principles as govern private employees' suits under section 706(f).

Section 717(c) of Title VII, 42 U.S.C. section 2000e-16(c)(1970 ed., Supp. IV), states that a federal employee "may file a civil action as provided in section 706". Section 717(d), 42 U.S.C. section 2000e-16(d)(1970 ed., Supp. IV), goes on to specify that "[t]he provisions of section 706(f) through (k), as applicable, shall govern civil actions brought hereunder." Given that the limitation period contained in section 706(f)(1) has been construed as being non-jurisdictional, Baldwin County Welcome Center v. Brown, ___ U.S. ___, 104 S.Ct. 1723, 1731, it follows from the above-cited statutory language that the limitation period provided by section 717(c) must be afforded the same interpretation. This construction of

section 717(c) is consistent with the express intent of Congress, that "aggrieved [federal] employees or applicants will also have the full rights available in the courts as are granted tc individuals in the private sector under Title VII". S. Rep. No. 92-415, 92nd Cong. 1st Sess., 424 (1971).

1.d. Respondent further contends that review of the Ninth Circuit's decision is not warranted because there really exists no conflict between the circuits on the jurisdictional issue. [Unprinted transcript of Respondent's Opposition, pp. 9-11]. This argument is specious. All three of the circuit court decisions which conflict with the Ninth Circuit's decision below involved suits against a federal defendant. Martinez v. Orr, 738 F.2d 1107 (10th Cir. 1984); Milam v. United States

Postal Service, 674 F.2d 860 (11th Cir. 1982); Salz v. Lehman, 672 F.2d 207 (D.C. Cir. 1982). Therefore, any attempt to distinguish this case on a federal versus non-federal basis is unsound.

Furthermore, in Stuckett v. United States Postal Service, No. 83-6839 (October 9, 1984), Justices White and Rehnquist specifically stated that Milam v. United States Postal Service, 674 F.2d 860 (11th Cir. 1982) and Salz v. Lehmen, 672 F.2d 207 (D.C. Cir. 1982) conflict with the position of the Seventh Circuit on the jurisdictional issue presented by this case. There is clearly a conflict between the circuits on the jurisdictional issue.

1.e. Finally, Respondent argues that this case is not proper for review

because the Petition for Writ of Certiorari suggested no grounds for equitable tolling of the filing period and because Petitioner did not question the jurisdictional nature of the filing period below. [Unprinted transcript of Respondent's Opposition, p. 11].

In the District Court below, Petitioner did offer facts which would support equitable tolling of the filing period limitation and did argue that that period should be extended in light of equitable considerations. The full record, when presented to this Court, will reflect Petitioner's efforts in this regard. Stuckett v. United States Postal Service, supra, can be distinguished on this basis.

The issue as to whether equitable tolling would in fact have been justified in this particular case was not

reached by either the trial court or the Ninth Circuit, and that issue is not before this Court. Should this Court ultimately hold that the thirty-day filing period is subject to equitable tolling, the case should be remanded to the trial court for application of that doctrine to the facts of the case. It would be premature, and immaterial to the questions presented, to set forth those facts here.

The Rule 15(c) Issue

Respondent's argument against Petitioner's request that the Court accept review of the second question presented is based primarily on the proposition that, for Rule 15(c) purposes, federal defendants should be treated differently than non-federal defendants, and that they have in fact been so treated by the circuit courts.

[Unprinted transcript of Respondent's Opposition, pp. 14 and 18-19]. However, no such difference in treatment has ever existed at the circuit court level.

Respondent has been unable to point to a single district or circuit court decision that actually draws the federal defendant/non-federal defendant distinction it proposes, and to Petitioner's knowledge, none exists. In fact, the only court which has considered such a distinction rejected it and applied the Second Circuit's holding in Ingram v. Kumar, 585 F.2d 566 (2d Cir. 1978), cert. denied, 440 U.S. 940 (1979) to a suit against the United States Postal Service. Murray v. United States Postal Service, 569 F. Supp. 794, 796-797 (N.D.N.Y. 1983).

In Stewart v. United States, 655 F.2d 741 (7th Cir. 1981), the Seventh

Circuit did not base its holding on any distinction between a federal versus a non-federal defendant. It simply applied the same restrictive interpretation of Rule 15(c) in a suit against the former as it had previously applied in a suit against the latter. Simmons v. Fenton, 480 F.2d 133 (7th Cir. 1969). In another Seventh Circuit decision cited by Respondent, Hughes v. United States, 701 F.2d 56 (7th Cir. 1982), the court contrasted its interpretation of Rule 15(c) with that of the Second Circuit in Ingram v. Kumar, supra. In so doing, the court made no mention of any federal/non-federal distinction between the two cases.

Similarly, the Ninth Circuit draws no such distinction for Rule 15(c) purposes. In Williams v. United States, 711 F.2d 893 (9th Cir. 1983), the Ninth

Circuit stated: "A party being brought in by amendment under F.R.C.P. 15(c) must have received notice of the institution of the suit 'within the period provided by law for commencing an action against him'". 711 F.2d at 898 (emphasis added). The Ninth Circuit has never indicated that it would treat federal and non-federal parties any differently in this regard.

Nor has the Fifth Circuit. In fact, in Carr v. Veterans' Administration, 522 F.2d 1355 (5th Cir. 1975), the court based its decision on the holding in Martz v. Miller Brothers Company, 244 F. Supp. 246, 254 (D. Del. 1965), a case involving a private defendant.

Respondent's implication that the Second Circuit draws such a distinction in view of that court's holding in Evans

v. United States Veteran's Administration Hospital, 391 F.2d 261, cert. denied, 393 U.S. 1040 (1968) ignores the plain language of the Second Circuit's subsequent decision in Ingram v. Kumar, supra. The Ingram court explained that the decision in Evans was based on that fact that service of process on the originally misnamed federal defendant was not effected within a reasonable period of time, not because the new federal defendant had not received notice within the statute of limitations period. 585 F.2d at 572, n. 12. The Second Circuit position is that in all cases, whether against a federal or non-federal defendant, the period within which the party to be brought in must receive notice of the action includes a reasonable time as allowed under the Federal Rules for service of process.

This conflicts with the view taken by the Ninth and Seventh Circuits, and is consistent with the view held by the Fifth Circuit and the Tenth Circuit. Kirk v. Cronvich, 629 F.2d 404 (5th Cir. 1980); Hunt v. Broce Construction Company, 674 F.2d 834, 836-837 (10th Cir. 1982). Respondent's contention that no conflict exists as to the Rule 15(c) issue as applied to cases involving federal defendants is based on an elaborate misstatement of existing circuit court authority and should be rejected. The Petition should be granted as to both questions presented.

Conclusion

At the risk of dignifying Respondent's closing remarks, Petitioner is compelled to protest Respondent's inaccurate and improper references to portions of settlement discussions in this

case. References to these discussions constitute a flagrant violation of Federal Rules of Evidence Rule 408. More importantly, Respondent's remarks are a frail attempt to misdirect the Court's attention to factors and circumstances, inaccurately stated, which are beyond the purview of consideration in deciding whether to grant a petition for writ of certiorari.

Despite Respondent's unfounded assertion to the contrary, this case presents two related and controverted questions involving jurisdiction and federal civil procedure the import of which should not be minimized. What is at stake in this lawsuit and countless others like it is the protection of the right of federal employees to pursue their claims of employment discrimination under Title VII against the federal

government. What is at stake for Petitioner Karen A. Cooper is the vindication of her civil rights under the law, which is not an insignificant matter.

Nothing is more basic to the viability and success of any lawsuit than the naming of the proper defendant and the filing of a timely complaint. Clarification of the parameters of these legal issues will redound to the benefit of the courts, and to current and potential litigants, including the federal

government. For all the reasons stated above, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

THE EMPLOYMENT LAW CENTER
JOAN M. GRAFF
LINDA J. KRIEGER
Counsel of Record
PATRICIA A. SHIU
693 Mission Street
Seventh Floor
San Francisco, CA 94105
(415) 495-6420

ELLEN LAKE
JEFFERY E. ESTES AND
ASSOCIATES
MARK F. CAROLIN

SUPREME COURT OF THE UNITED STATES

KAREN A. COOPER *v.* UNITED STATES POSTAL SERVICE

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 84–600. Decided April 15, 1985

The petition for a writ of certiorari is denied.

JUSTICE WHITE, dissenting.

In December 1980, petitioner filed an administrative complaint with respondent, her employer, alleging that she had been denied a position because of her sex. The Regional Postmaster General denied the complaint, notifying petitioner that she could appeal to the Equal Employment Opportunity Commission within 20 days, or file suit in federal district court within 30. See 42 U. S. C. §2000e–16(c). Choosing the latter route, petitioner filed this suit on October 29, 1982, the day before the 30-limit expired. She did not serve copies of the complaint on the United States Attorney or the Attorney General until January 1983, and did not serve the Postmaster General until February. The record does not indicate when or if the Postal Service, which was the named defendant, was served, but it was not within the 30-day period.

The District Court dismissed the complaint because it did not name the proper defendant, who was the Postmaster General. §2000e–16(c). Petitioner sought to correct this defect and have the amendment relate back to the date of the initial complaint. See Fed. Rule Civ. Proc. 15(c).[1] The

[1] That rule provides:

"Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the

District Court denied the motion on the ground that the Postmaster General had not had notice of the suit within the 30-day period.

On appeal, a panel of the Ninth Circuit agreed that the Postmaster General was the only proper defendant and that the 30-day period was a flat—parenthetically, a jurisdictional—requirement. Therefore, petitioner's action was necessarily time-barred unless the amendment could relate back to the date of the original complaint. Observing that "[t]here is no unanimity among the circuits concerning the proper interpretation of rule 15(c)'s notice provision," the court adopted a strict, literal reading and affirmed.

The case raises two important issues. The first is whether the 30-day limit of § 2000e–16(c) is jurisdictional or, like the equivalent limitation for suits against private employers, see *Zipes* v. *Trans World Airlines, Inc.*, 455 U. S. 385 (1982), subject to waiver, estoppel, and equitable tolling. I have previously noted my dissent from the Court's refusal to address this issue, which has divided the Courts of Appeals. See *Stuckett* v. *United States Postal Service*, —— U. S. —— (1984) (WHITE, J., joined by REHNQUIST, J., dissenting from denial of certiorari). In light of the Court of Appeals' firm stance on the 30-day requirement and its view that petitioner's claim "must be barred" unless the amendment related back, I believe the issue is presented here. I continue to think it merits our attention.

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institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have know that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

The delivery or mailing of process to the United States Attorney, or his designess, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant."

The petition also challenges the Ninth Circuit's strict reading of Rule 15(c).[2] As that court observed, the Courts of Appeals have not taken a consistent approach to this provision. Some have rejected a literal construction of the requirement that the added party have had notice of institution of the action within "the period provided by law for commencing the action against him," allowing, for example, a reasonable time thereafter for service of process. See *Kirk* v. *Cronvich*, 629 F. 2d 404, 408 (CA5 1980); *Ingram* v. *Kumar*, 585 F. 2d 566, 571–572 (CA2 1978), cert. denied, 440 U. S. 940 (1979); see also *Ringrose* v. *Engelberg Huller Co.*, 692 F. 2d 403, 410 (CA6 1982) (Jones, J., concurring). The argument in favor of such a grace period for service of process is appealing when the statute of limitations is as short as 30 days. On the other hand, the Ninth Circuit is hardly alone in requiring that the added defendant have had notice strictly within the limitations period. See, *e. g.*, *Watson* v. *Unipress, Inc.*, 733 F. 2d 1386, 1390 (CA10 1984) (explicitly rejecting *Ingram*, *supra*); *Trace X Chemical, Inc.* v. *Gulf Oil Chemical Co.*, 724 F. 2d 1397, 1400–1401 (CA8 1983); *Hughes* v. *United States*, 701 F. 2d 56, 58–59 (CA7 1981).

Relying on the implications of the rule's second paragraph, respondent argues that except as provided therein, actual notice is always required against a federal defendant. It points out that the cases with which the decision below conflicts did not involve federal defendants. This effort to separate federal from private defendants may or may not be legitimate, but neither the court below nor any other cited decision relied on the identity of the added defendant in denying relation back. Moreover, this argument goes more to the question of when the added defendant may be deemed to

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[2] The two questions presented are not unrelated. For example, were the 30-day period jurisdictional, the question would arise whether a district court would even have the power, notwithstanding the authorization of Rule 15(c), to add a new defendant after 30 days. See generally *Canavan* v. *Beneficial Finance Corp.*, 553 F. 2d 860, 864–865 (CA3 1977).

have had notice,[3] rather than the question, raised be petitioner, whether the period within which notice is required may be viewed flexibly.

In light of the conflicts in the lower courts on both issues raised by this petition, I would grant certiorari and set the case for oral argument.

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[3] In some cases, as where a complaint naming a corporation as the defendant is later amended to add the corporation's owner, *e. g.*, *Itel Capital Corp.* v. *Cups Coal Co.*, 707 F. 2d 1253, 1258 (CA11 1983), or parent corporation, *e. g.*, *Marks* v. *Prattco, Inc.*, 607 F. 2d 1153 (CA5 1979), the added party is deemed to have had notice in light of its identity of interests or close association with the original defendant. See generally *Hernandez Jimenez* v. *Calero Toledo*, 604 F. 2d 99, 102–103 (CA1 1979). Petitioner's position is somewhat weak in this regard because, while the complaint was filed within the requisite 30 days, no party was served with process within that period.